

THE ASSOCIATED GENERAL CONTRACTORS OF CONNECTICUT, INC.

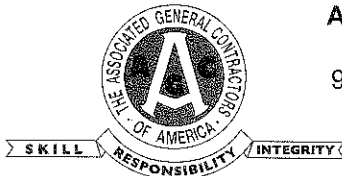
A Division of Connecticut Construction Industries Association, Inc.

912 SILAS DEANE HIGHWAY, WETHERSFIELD, CT 06109-3433

Telephone (860) 529-6855

Fax (860) 563-0616

E-mail: ccia-info@ctconstruction.org



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Senate Bill 70, An Act Concerning Fairness in Certain Commercial Construction Contracts General Law Committee February 21, 2012

AGC of Connecticut Position: Support with technical amendment

Connecticut Construction Industries Association, Inc. (CCIA) represents various sectors of the commercial construction industry in Connecticut and is comprised of members who have a long history of providing quality work for the public benefit. CCIA seeks to advance and promote a better quality of life for all citizens in the state. Formed over 40 years ago, CCIA is an organization of associations, where all sectors of the commercial construction industry work together to advance and promote their shared interests. CCIA is comprised of more than 300 members, including contractors, subcontractors, suppliers and affiliated organizations representing many sectors of the construction industry.

AGC of Connecticut is the building division of CCIA, representing 150 commercial, industrial, and institutional construction contractors, subcontractors, material suppliers and professionals serving the Connecticut construction industry. AGC is a chapter of AGC of America.

AGC of Connecticut supports Senate Bill 70, An Act Concerning Fairness in Certain Commercial Construction Contracts. AGC of Connecticut respectfully requests that the General Law Committee adopt a technical amendment and approve the bill. (The proposed amendment is below and a marked-up copy of the bill is attached.) AGC also thanks the committee for raising the bill.

Senate Bill 70 would amend the timely payment-fairness in financing law under commercial construction contracts. The changes, which would clarify and improve the relevant state statute, provide as follows:

- Establish, for all pending or approved change orders or directives, a minimum rate of overhead and profit of at least 15% of the total value of the work; and provide relief from performing any additional changes to the work when such orders or directives exceed 5% of the original total contract or subcontract cost.
- If the owner does not pay any person who has not been paid by the contractor "for such labor and materials supplied in the performance of the work under the contract," the owner must, upon notice of such person, place the funds in an interest-bearing escrow account. (The exception to this requirement that occurs when the contractor, subcontractor, or supplier has not substantially performed the work or supplied the materials according to the terms of the contract remains unchanged.) This would address the issue in LVI Environmental Services, Inc. v. Yale University, 50 Conn.L.Rptr. 553

Conn.Super. (Sept. 8, 2010), which found that Conn. Gen. Stat. §42-158j requires a direct contractual relationship between the owner and the claimant in order to require the owner to escrow funds for non-payment.

- Where a subcontractor or supplier makes a direct claim against the owner for payment, the bill refers to the provision of the statute concerning construction contract provisions that require prompt payment by the owner to the contractor, Conn. Gen. Stat. §42-158j(a)(1). This would clarify that a claim by a subcontractor or supplier is not valid unless and until the contractor with the direct contractual relationship with the owner has made a written request of the owner for payment.
- If the owner pays the subcontractor or supplier directly, the contractor with the direct contractual relationship with the owner is discharged of his payment obligations under the contract to the extent of that payment.

AGC of Connecticut supports Senate Bill 70 because:

- General contractors and construction managers need the assurance clarified in statute that subcontractors may only make payment claims directly to the owner for payments for which they – the general contractors or construction managers – have already made a written request to the owner.
- Relieving contractors and subcontractors of any duty to perform any additional changes to the work when the undisputed amount for unprocessed change orders exceeds 5% of their contract value would lead to more timely processing of change orders and payment for extra work.
- It would encourage the settlement of problems related to unprocessed change orders during the project rather than having them fester until the end of the project.

Proposed amendment to Senate Bill 70 (LCO No. 882)

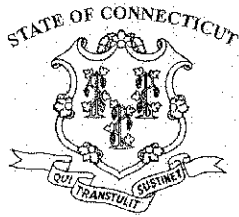
In line 28, strike “subcontractors who have” and substitute “subcontractor who has” in lieu thereof.

In line 29, strike “are” and substitute “is” in lieu thereof.

Strike line 80 and substitute the following in lieu thereof: “receiving notice under subdivision (1), (2) or (3) of this subsection or subparagraph (B) of this subdivision.”.

Please contact John Butts, Executive Director of AGC of Connecticut, or Matthew Hallisey, Director of Government Relations and Legislative Counsel for CCIA, at 860-529-6855, if you have any questions or if you need additional information.

PROPOSED AMENDMENT



General Assembly

February Session, 2012

Raised Bill No. 70

LCO No. 882

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Referred to Committee on General Law

Introduced by:
(GL)

AN ACT CONCERNING FAIRNESS IN CERTAIN COMMERCIAL CONSTRUCTION CONTRACTS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. Section 42-158j of the general statutes is repealed and the
2 following is substituted in lieu thereof (*Effective October 1, 2012*):

3 (a) Each construction contract shall contain the following
4 provisions: (1) A requirement that the owner pay any amounts due
5 any contractor, subcontractor or supplier in a direct contractual
6 relationship with the owner, whether for labor performed or materials
7 furnished, not later than thirty days after the date any written request
8 for payment has been made by such contractor, subcontractor or
9 supplier; (2) a requirement that the contractor pay any amounts due
10 any subcontractor or supplier, whether for labor performed or
11 materials furnished, not later than thirty days after the date the
12 contractor receives payment from the owner which encompasses labor
13 performed or materials furnished by such subcontractor or supplier;
14 [and] (3) a requirement that the contractor shall include in each of its
15 subcontracts a provision requiring each subcontractor and supplier to
16 pay any amounts due any of its subcontractors or suppliers, whether

17 for labor performed or materials furnished, not later than thirty days
 18 after the date such subcontractor or supplier receives a payment from
 19 the contractor which encompasses labor performed or materials
 20 furnished by such subcontractor or supplier; (4) a requirement that, for
 21 all pending or approved change orders or directives, the minimum
 22 allowable rate of overhead and profit to be paid to any contractor or
 23 subcontractor who performs such work shall be not less than fifteen
 24 per cent of the total value of such work; and (5) a requirement that at
 25 any time the cumulative sum of the total pending construction change
 26 orders or other pending change directives exceeds five per cent of the
 27 original total contract or subcontract cost, the contractor or
 28 subcontractors who have performed work under such pending change
 29 orders or directives are relieved of any express or implied duty to
 30 perform any additional changes to the work under the terms of such
 31 contract or subcontract.

32 (b) Each payment requisition submitted in accordance with the
 33 requirements of subsection (a) of this section shall include a statement
 34 showing the status of all pending construction change orders, other
 35 pending change directives and approved changes to the original
 36 contract or subcontract. Such statement shall identify the pending
 37 construction change orders and other pending change directives, and
 38 shall include the date such change orders and directives were initiated,
 39 the costs associated with their performance and a description of any
 40 work completed. As used in this section, "pending construction change
 41 order" or "other pending change directive" means an authorized
 42 directive for extra work that has been issued to a contractor or a
 43 subcontractor, but an approved change order has not yet been issued
 44 and payment can not be processed for such extra work.

45 (c) (1) If payment is not made by an owner in accordance with the
 46 requirements of subdivision (1) of subsection (a) of this section or any
 47 applicable construction contract, such contractor, subcontractor or
 48 supplier shall set forth its claim against the owner through notice by
 49 registered or certified mail.

50 (2) If payment is not made by a contractor in accordance with the
51 requirements of subdivision (2) of subsection (a) of this section or any
52 applicable construction contract, the subcontractor or supplier shall set
53 forth its claim against the contractor through notice by registered or
54 certified mail.

55 (3) If payment is not made by a subcontractor or supplier in
56 accordance with the provisions of subdivision (3) of subsection (a) of
57 this section, the subcontractor or supplier to whom money is owed
58 shall set forth its claim against the subcontractor or supplier who has
59 failed to comply with the provisions of said subdivision (3) through
60 notice by registered or certified mail.

61 (4) (A) Ten days after the receipt of any notice specified in
62 subdivisions (1), (2) and (3) of this subsection, the owner, contractor,
63 subcontractor or supplier, as the case may be, shall be liable for interest
64 on the amount due and owing at the rate of one per cent per month.
65 Such interest shall accrue beginning on the date any such notice is
66 received. In addition, such owner, contractor, subcontractor or
67 supplier, upon written demand from the party providing such notice,
68 shall be required to place funds in the amount of the claim, plus such
69 interest of one per cent per month, in an interest-bearing escrow
70 account in a bank in this state, [, provided]

71 (B) Each owner that enters into a contract under this section and
72 fails or neglects to make payment to a contractor for labor and
73 materials supplied under a contract, as required pursuant to
74 subdivision (1) of subsection (a) of this section, shall, upon notice by
75 any person who has not been paid by the contractor for such labor and
76 materials supplied in the performance of the work under the contract,
77 place funds in the amount of the claim, plus such interest of one per
78 cent per month, in an interest-bearing escrow account in a bank in this
79 state. Any such owner, contractor, subcontractor or supplier, upon
80 receiving notice under subparagraph (A) or (B) of this subdivision,
81 may refuse to place the funds in escrow on the grounds that the party

subdivision (1), (2) or (3) of this subsection or

82 making such demand has not substantially performed the work or
83 supplied the materials according to the terms of the construction
84 contract. In the event that such owner, contractor, subcontractor or
85 supplier refuses to place such funds in escrow and such owner,
86 contractor, subcontractor or supplier is found to have unreasonably
87 withheld payment due a party providing such notice, such owner,
88 contractor, subcontractor or supplier shall be liable to the party making
89 demand for payment of such funds and for reasonable attorneys' fees
90 plus interest on the amount due and owing at the rate of one per cent
91 per month. In addition, any owner, contractor, subcontractor or
92 supplier who is found to have withheld payments to a party providing
93 such notice in bad faith shall be liable for ten per cent damages.

94 (d) No payment may be withheld from a subcontractor or supplier
95 for work performed or materials furnished because of a dispute
96 between a contractor and another contractor, subcontractor or
97 supplier.

98 (e) This section shall not be construed to prohibit progress payments
99 prior to final payment of the contract and is applicable to all
100 subcontractors and suppliers for material or labor whether they have
101 contracted directly with the contractor or with some other
102 subcontractor on the work. Each owner that enters into a contract
103 under this section and fails or neglects to make payment to a
104 contractor for labor and materials supplied under a contract, as
105 required pursuant to subdivision (1) of subsection (a) of this section,
106 shall, upon demand of any person who has not been paid by the
107 contractor for such labor and materials supplied in the performance of
108 the work under the contract, promptly pay the person for such labor or
109 materials. Demand for payment shall be served on the owner and a
110 copy of each demand shall be sent to the contractor by certified mail,
111 return receipt requested to any address at which the owner and
112 contractor conduct business. If the owner fails to make such payment,
113 the person making the demand shall have a direct right of action
114 against the owner in the superior court for the judicial district in which

115 the project is located. The owner's obligations for direct payments to
 116 the contractor, subcontractors or suppliers giving notice pursuant to
 117 this section shall be limited to the amount owed to the contractor
 118 pursuant to subdivision (1) of subsection (a) of this section by the
 119 owner for work performed under the contract at the date such notice is
 120 provided. Any payment made directly by the owner to a subcontractor
 121 or supplier for labor or materials, which is the subject of a direct
 122 contractual relationship between such subcontractor or supplier and a
 123 contractor, shall discharge the obligation of such contractor to the
 124 extent of such payment.

This act shall take effect as follows and shall amend the following sections:

Section 1	October 1, 2012	42-158j
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Statement of Purpose:

To require timely payment pursuant to certain commercial construction contracts.

[Proposed deletions are enclosed in brackets. Proposed additions are indicated by underline, except that when the entire text of a bill or resolution or a section of a bill or resolution is new, it is not underlined.]

